



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 795

Case No. 882: EL-SHARKAWI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of El-Moetaz El-Sharkawi, a former
staff member of the United Nations, the President of the Tribunal,
with the agreement of the Respondent, successively extended to
31 December 1994, 5 March, 31 May, 31 August and 30 November 1995,
the time-limit for the filing of an application to the Tribunal;

Whereas, on 10 November 1995, the Applicant filed an
application requesting the Tribunal:

- "(a) To direct the Secretary-General to reinstate the
Applicant or, should the Secretary-General decline to do
so, to pay to the Applicant compensation higher than the
compensation recommended by the Joint Appeals Board
(...);
- (b) To find that in the Applicant's case the Administration
has been guilty of abuse of power and to award to the
Applicant appropriate compensation on this count as well
(...);
- (c) To order the Secretary-General to consider the
Applicant, as a matter of priority, for future vacancies
in the Secretariat for which he is qualified and, in the
meantime, to pay the Applicant compensation for the
violation of his entitlements under the recommendation
of the Joint Appeals Board, which had been accepted by
the Secretary-General (...); and

- (d) To award to the Applicant compensation also for the damage to his professional reputation and for the emotional suffering which the actions of the Administration have caused to him (...)."

Whereas the Respondent filed his answer on 26 February 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on a three-month short-term contract as an Associate Information Officer, at the P-2 level, in the Department of Public Information (DPI), Information Products Division. Subsequently, he worked as an Independent Contractor with the Publishing Activities Group, serving for eight months on a series of special service agreements, from 30 October 1990 to 30 June 1991. With retroactive effect to 1 August 1991, the Applicant was recruited by the Department of Conference Services (DCS), as a Publishing Officer, on a six-month fixed-term appointment, at the P-2, step II level.

The Applicant was employed as a result of action taken by the Secretary-General in response to a recommendation in 1986, by a group of High Level Inter-Governmental Experts (the Group of 18) to set up a group within DCS to identify UN-oriented books for publication. By a series of fixed-term appointments, the Applicant's initial appointment was extended until 31 December 1992. On 24 June 1992, the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM), approved the extension of the Applicant's appointment through 31 December 1992, on the understanding that the Applicant would be placed against a post at the P-2 level. The P-3 post against which he had been recruited was to be made available for the 1992 promotion review exercise.

On 21 July 1992, the Administrative Officer, Office of Conference Services (OCS), informed the Chief, Professional Staffing Service, OHRM, that the Applicant would be placed against a post at

the P-2 level. In order to satisfy the terms of the ASG/OHRM's approval, OCS intended to extend the Applicant's contract on a month-to-month basis, until OCS was able to identify a vacant post at the P-2 level.

On 25 November 1992, the External Publications Officer, OCS, wrote to the Director of the Publishing Division, OCS, recommending an extension of the Applicant's appointment "for at least a year". However, on 22 December 1992, the Deputy Executive Officer, OCS, Department of Administration and Management (DAM), requested the Recruitment and Placement Officer, Professional Staffing Service, OHRM, to extend the Applicant's appointment for six months only, through 30 June 1993. On 21 January 1993, the Officer-in-Charge, Professional Staffing Services, OHRM, recommended to the Director of Personnel that extension of the Applicant's appointment be approved only through 31 January 1993. He noted that any subsequent extension of the Applicant's appointment had to be contingent upon certain developments relating to the post and, in any case, the Applicant's appointment being made only on a month to month basis after a break in service of one month. This recommendation was approved by the Director of Personnel.

On 29 January 1993, the Deputy Executive Officer, OCS/DAM, informed the Applicant that although OCS had requested an extension of the Applicant's fixed-term appointment through 30 June 1993, the request had been approved only through 31 January 1993. The Applicant was further informed that his last day of duty would be 29 January 1993. He separated from service on 31 January 1993.

On 2 February 1993, the Director, Publishing Division, OCS, wrote to the Director, OCS, requesting the Applicant's reinstatement for a period of six months, pending the finalization of the necessary recruitment measures. On 5 February 1993, the Director, OCS, requested the Director of Personnel, OHRM, to review the Applicant's situation "with a view to finding an equitable solution that would take into account both the substantive and human aspects

of this issue". On 25 February 1993, the Under Secretary-General, DPI, and the Director, OCS, in a joint memorandum, requested the Director of Personnel to extend the Applicant's appointment on the ground that they had been able to identify one P-2 post "for reassignment" within DPI, while hoping that a P-3 frozen OCS post could be released.

On 29 March 1993, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment. On 10 July 1993, he lodged an appeal with the Joint Appeals Board (JAB). The JAB joined his appeal to that of another staff member in a similar situation. The JAB adopted its report on 12 April 1994. Its considerations, conclusions and recommendations read, in part, as follows:

"22. The Panel next turned to what it considered to be a crucial issue in this case: whether, despite the fact that their contracts spelled out in the appropriate staff rule 104.12, that this type of appointment carried no expectancy of continued employment after the expiration date, the circumstances surrounding their employment and separation had created such an expectancy.

23. The Panel examined these circumstances in the light of the relevant jurisprudence of the UNAT [United Nations Administrative Tribunal]. The Panel noted that, in the Tribunal's view, the length of the period served under the appointment and the quality of service rendered were not in themselves sufficient to create an expectancy of continued employment. Disregarding these aspects therefore, the Panel nevertheless found that the repeated intervention by their Department insisting on their continued retention for the purpose of continuing the work on which they had successfully embarked and which was mandated by the Secretary-General's desire to carry out the recommendations of the 'Group of 18', might have created the impression in the minds of the Appellants that their employment would be continued.

24. This was not unreasonable, despite the fact that they must have been aware of the objections raised by OHRM to such continuation as these objections were not based on their

qualifications for the posts they occupied nor the continuing need for the work they were doing, but on technical and legal considerations, such as the lack of proper authority for their being hired in the first place and the absence of vacant posts against which they could be placed.

25. In view of the fact that these difficulties had been overcome in the past, despite similar objections advanced then, they may have felt that they would be overcome again.

Conclusions and Recommendations

26. In light of these facts, the Panel believes that an expectancy of continued employment was created by the circumstances surrounding their employment and recommends that the Appellants be reinstated or, if there are no posts, be paid compensation equal to 6 months' net base salary at the rate in effect at the time of their separation from service and that the Appellants be considered for future vacancies for which they are qualified.

...

28. In the light of the circumstances of these cases, the Panel offers the following observations: expectancies of continued employment were raised in the two cases before it as a result of administrative confusion between Departments. Steps should be taken to avoid that an expectancy of continued employment should arise from administrative confusion, in circumstances where otherwise objectively no such expectancy could reasonably be presumed."

On 10 August 1994, the Applicant was advised by the Officer-in-Charge, DAM, of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has examined your case in the light of the Board's report. He is not in agreement with the belief of the Board that an expectancy of continued employment was created by the circumstances surrounding your employment, namely that 'difficulties had been overcome in the past despite similar objections advanced then, [and that you] may have felt that they would be overcome again'. To the contrary, the Secretary-General has found that the previous difficulties would serve to put you on notice of

potential problems with the extension of your appointment. The Secretary-General is also not in agreement with the Board's recommendation that you be reinstated or paid compensation of 6 months.

However, in the light of all of the circumstances of your case, including the possibility that your appointment might have been extended on a month to month basis, the Secretary-General has decided to pay you one month net base salary at the rate in effect at the time of your separation from service. The Secretary-General is also in agreement that you should be considered for future vacancies for which you are found to be qualified."

On 10 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In view of the circumstances of his case, the Applicant had a legitimate expectation that his contract would be renewed.
2. The Respondent agreed to renew the Applicant's fixed-term appointment if certain conditions were met. However, the Respondent ignored the constructive responses that he received, thereby violating the rights of the Applicant.
3. In failing to renew the Applicant's contract, the Administration was guilty of abuse of power.

Whereas the Respondent's principal contentions are:

1. Making good faith efforts to place a staff member does not give rise to a legal expectation of continuing employment.
2. The decision not to renew the Applicant's fixed-term contract did not constitute abuse of power and was not motivated by extraneous factors.

The Tribunal, having deliberated from 4 to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 10 August 1994. That decision rejected a unanimous Joint Appeals Board (JAB) recommendation that the Applicant be reinstated or, alternatively, be paid compensation in the amount of six months' salary. The JAB also recommended that the Applicant be considered for future vacancies for which he might be qualified. The latter recommendation was accepted by the Respondent. The Applicant's claim is that the decision of the Respondent not to extend his contract was an abuse of power. He further requests compensation in an amount greater than the six months' net salary that was recommended by the JAB, as well as compensation for professional and moral damages. The Applicant also asks the Tribunal to order the Respondent to reinstate him. If there are, at present, no suitable vacant posts, he should be treated as a priority candidate for future vacancies.

II. The issue in this case is whether the decision not to renew the Applicant's fixed-term appointment was a valid exercise of the Secretary-General's discretion. The Tribunal's role is to ensure that the discretionary authority of the Secretary-General is not exercised in a manner that violates notions of fairness and justice.

III. The Tribunal notes the Staff Rules which deal with fixed-term contracts. Staff rule 104.12(b) provides that:

"... The fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment."

In addition, staff rule 109.7(a) provides that:

"A temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment."

The Applicant also signed a United Nations "Letter of Appointment" which states, inter alia:

"The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations."

IV. The Applicant served on a series of successive fixed-term appointments for an uninterrupted period of 18 months. On 29 January 1993, the Applicant was informed that his appointment would not be extended. The Applicant claims that he had a legitimate expectancy of renewal under the circumstances. It has been the Tribunal's consistent jurisprudence to hold that a series of successive fixed-term appointments is not sufficient to create a legitimate expectation of continued employment (Judgements No. 305, Jabbour (1983) and No. 427, Raj (1988)); that employment with the Organization ceases on the expiration date of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even by outstanding performance; (Judgements No. 173, Papaleontiou (1973); No. 440, Shankar (1989); No. 496, B. (1990) and No. 506, Bhandari (1991)). The Tribunal has also held that any factor that may have misled the staff member into believing that his or her contract of employment might be extended or converted into more permanent employment must be weighed to determine whether it was the Respondent who was responsible for causing the misapprehension (cf. Judgements No. 142, Bhattacharyya (1971) and No. 242, Klee (1979)).

V. In the case before it, the Tribunal finds several actions by the Respondent that may have misled the Applicant into believing that his contract would be renewed. Firstly, the Applicant was hired to work on an undertaking which was considered a long-term project of the United Nations. Secondly, the Applicant received

repeated assurances from his supervisor that his presence was essential to the success of the project. Thirdly, there were repeated interventions by the substantive department, insisting on the Applicant's continued employment in order to finalize the project on which he was working. These factors together may have created the reasonable impression that the Applicant's employment would be continued. Therefore, based on these circumstances, the Tribunal agrees with the JAB's recommendation that the Applicant be compensated.

VI. The Applicant also claims that the non-renewal of his appointment constituted abuse of power, and was motivated by prejudice or other extraneous factors. The Tribunal has consistently held that an Applicant, when alleging prejudice or abuse of power, has the burden of proving these grounds by compelling evidence (Judgements No. 312, Roberts (1983) and No. 470, Kumar (1989)). Therefore, it is clearly incumbent upon the Applicant to prove these allegations. Having reviewed the material before it, the Tribunal concludes that the Applicant has failed so to prove.

VII. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay the Applicant compensation equal to six months' net base salary at the rate in effect at the time of his separation from service, in addition to the compensation awarded by the Secretary-General in his decision of 10 August 1994.

(2) Orders that the Applicant should be considered for vacancies suitable for his qualifications and experience.

(3) Rejects all other pleas.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary